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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-694, Judulang v. Holder.

5 Mr. Fleming.

6 ORAL ARGUMENT OF MARK C. FLEMING

7 ON BEHALF OF THE PETITIONER

8 MR. FLEMING: Mr. Chief Justice, and may it
9 please the Court:

10 In Hernandez-Casillas, the Attorney General
11 confirmed that a lawful permanent resident subject to
12 deportation, quote, "must have the same opportunity to
13 seek discretionary relief as an alien who has
14 temporarily left this country and upon reentry been
15 subject to exclusion."

16 2 months later in its published decision in
17 Matter of Meza, the BIA again confirmed that an
18 immigrant deportable for an aggravated felony could seek
19 relief because his conviction could also form the basis
20 for excludability.

21 Immigrants in situations indistinguishable
22 from Mr. Judulang's applied for and received relief
23 under this rule. The BIA's decision in Blake changed
24 the law. Without explaining or even initially
25 acknowledging that it was doing so, the Blake rule was

1 impermissibly retroactive, and it is arbitrary and
2 capricious on its own merits. We would submit the
3 evidence --

4 JUSTICE SCALIA: How do you explain -- I
5 mean, I think that is a principal point, whether Blake
6 and Brieva changed the law. How do you explain the
7 language in Matter of Wadud, which antedates by a good
8 deal those two cases, 1984, which says: "Section
9 212(c) can only be invoked in a deportation hearing where
10 the ground of deportation charged is also a ground of
11 inadmissibility." It seems to me that that's the basic
12 point.

13 MR. FLEMING: Two responses to that,
14 Justice Scalia. I agree, Matter of Wadud is the
15 principal response that the government has, and it does
16 not help them at all. Wadud was deportable for a
17 conviction under 18 U.S.C. 1546, and the BIA had held in
18 a case called Matter of RG in 1958 that that conviction
19 did not render him excludable.

20 And that is confirmed later in the case of
21 Matter of Jimenez-Santillano, which also involved a 1546
22 conviction, where the BIA says that if Mr. Jimenez had
23 left of the country and returned it appears that he
24 would not have been inadmissible and compares that
25 situation to someone convicted of a firearms offense,

1 which the board and the Attorney General had always said
2 were not waivable.

3 To the extent there is any ambiguity in the
4 language that Your Honor read, it could not have
5 survived the Attorney General's decision in
6 Hernandez-Casillas, which I just quoted at the beginning
7 of the presentation, which said that what one looks to
8 is whether alien in exclusion proceedings would be able
9 to invoke section 212(c) relief. And when the board
10 then addressed the case of the aggravated felony in
11 Matter of Meza, it did not even address Wadud or view it
12 as binding at all. It looked to the conviction and
13 whether it formed a basis for excludability.

14 And the BIA then followed up with no fewer
15 than eight decisions in crime of violence cases
16 indistinguishable from this case where the BIA cited,
17 not Wadud, not any of the other cases that the
18 government is relying on, but cited Meza as articulating
19 the doctrine that the focus of analysis is on the
20 conviction. And the Court has the briefs of several
21 former immigration officials, including two INS general
22 counsel and several INS trial attorneys, confirming that
23 that was the position and the basis on which the
24 government litigated these cases --

25 JUSTICE KAGAN: Mr. --

1 MR. FLEMING: And in fact -- yes, Justice
2 Kagan?

3 JUSTICE KAGAN: Please finish.

4 MR. FLEMING: If I may, I was just going to
5 say that a number of these cases, crime of violence
6 cases, reached the merits in both the BIA and the courts
7 of appeals without the government even suggesting that
8 there was a statutory counterpart problem. In fact,
9 when it has suited its purposes the government and the
10 BIA have admitted that Blake was a change, including in
11 a brief filed in the Ninth Circuit less than a year ago.

12 JUSTICE KAGAN: You cite some cases. You
13 say there was a dramatic change in the law. The
14 government cites some cases and it says there was no
15 change in the law. What if the truth lies someplace in
16 the middle. What if, in fact, when you look before
17 Blake what you see is some amount of confusion; that the
18 board sometimes was following the Blake rule, but that
19 at other times individual judges or maybe the board
20 itself were doing something different, because the
21 individual circumstances suggested that they should, or
22 just because they weren't so clear on the difference
23 between these two approaches.

24 And then Blake comes along, and what Blake
25 does is neither to change something dramatically nor to

1 just reaffirm what was there, but in some sense to
2 create a little bit of order out of chaos. What would
3 that do to your argument if that's the way one
4 understood Blake?

5 MR. FLEMING: Obviously, Justice Kagan, we
6 don't think that is the proper way to understand Blake.
7 But to answer the question, for purposes of the
8 retroactivity analysis, the Court uses what the Court in
9 St. Cyr called "considerations of fair notice,
10 reasonable reliance, and settled expectations." And we
11 would submit that reliance was more than reasonable and
12 expectations more than settled as to how the board was
13 addressing crime of violence aggravated felony
14 convictions prior to Blake, as is shown by the evidence
15 that I cited a minute ago, namely the position that the
16 government itself was taking in these cases and the way
17 that immigrants would have been advised by both criminal
18 defense counsel and immigration counsel, including, for
19 that matter, INS trial counsel.

20 JUSTICE SCALIA: Well, reliance on confused
21 law is certainly not reasonable reliance. I mean, if
22 you accept the -- the premise that Justice Kagan
23 operates from, how can you say that -- that you're
24 reasonably relying on confused law?

25 MR. FLEMING: I don't accept the premise at

1 all, Justice Scalia, that the law was confused.

2 JUSTICE SCALIA: Well, that's a different
3 point.

4 MR. FLEMING: But even if -- even if there
5 was some lack of clarity in the law, and we don't think
6 there was, I think the record in this -- before the
7 Court is very clear, that people were advised by
8 competent counsel and that the government itself took
9 the same position in front of the immigration courts and
10 the courts of appeals that someone with a crime of
11 violence aggravated felony conviction could seek relief
12 because that conviction would make him or her excludable
13 and the availability of relief in deportation
14 proceedings is meant to be the same as it would be in
15 exclusion proceedings.

16 CHIEF JUSTICE ROBERTS: I understand the
17 advice of counsel, but what is the reasonable
18 expectation of that's been altered?

19 MR. FLEMING: The reasonable expectation
20 that once someone pleads guilty, Mr. Chief Justice, to
21 an excludable offense, one that would be waivable in
22 exclusion proceedings, that a waiver may be sought in
23 subsequent deportation proceedings on exactly the same
24 basis. And that is the published policy of the BIA.

25 CHIEF JUSTICE ROBERTS: So you're saying

1 that the expectation is when he pleads guilty to a
2 violent felony, that he expects, well, if I am deported
3 because of that I am going to be able to seek
4 discretionary waiver?

5 MR. FLEMING: Yes, that's quite correct,
6 Mr. Chief Justice. That is the ruling in St. Cyr, that
7 when someone -- when someone pleads guilty to an offense
8 that is eligible for relief under 212(c) there is
9 reliability on the possibility -- not a guarantee of a
10 waiver, obviously, but the avoidance of mandatory
11 deportation, appealing to the discretion of the Attorney
12 General.

13 CHIEF JUSTICE ROBERTS: How often are these
14 waivers granted?

15 MR. FLEMING: Quite frequently, I think.
16 The Court pointed out in St. Cyr that they are frequent
17 and now, because the category of people who are eligible
18 involves people who have very old convictions, they
19 necessarily pled before 1996, they are usually minor
20 offenses, they involve people who have been in this
21 country for a long time, they frequently have property,
22 they have families, they can show rehabilitation. Often
23 they only come to the attention of the immigration
24 authorities by applying for naturalization or by
25 renewing their green cards, and they get thrown into

1 deportation on the basis of these old convictions that
2 at the time of the plea would have been eligible for at
3 waiver, and it is simply unfair to change the law, as
4 Blake did, and impose that change on people who relied
5 on it in pleading guilty.

6 CHIEF JUSTICE ROBERTS: But in terms of the
7 expectation interest, we have to visualize someone who
8 is facing a serious charge and is entering a plea
9 bargain, where presumably the consideration of what he's
10 pleading to, how much of a sentence he's going to get,
11 all that, are dominant considerations. And he's also
12 going to say: Well, I have been advised that I will be
13 able to apply for a discretionary waiver, so I'm going
14 to plead guilty. That's a fairly unlikely scenario,
15 isn't it?

16 MR. FLEMING: On the contrary,
17 Mr. Chief Justice. The Court in St. Cyr made very clear
18 that's a very likely situation. It cited a couple of
19 cases at that time that specifically involved that
20 colloquy. The NIJC amicus brief which is before the
21 Court in this case identifies a couple of situations,
22 including the case of Mr. Ronald Bennett, who was
23 advised by his lawyer that when he pled guilty it would
24 not be a problem for him for his immigration status
25 because he could seek 212(c) protection.

1 CHIEF JUSTICE ROBERTS: No, no. I'm not
2 questioning the fact that he was advised, but presumably
3 the lawyer will also advise him: Oh, and you also have
4 to pay the \$250, you know, restitution, whatever, fee.
5 I am just questioning how significant that advice will
6 be when someone's determining whether to plead guilty or
7 not to a violent felony.

8 MR. FLEMING: I -- I understand,
9 Mr. Chief Justice. It is quite significant for people
10 whose ability to stay in this country is highly
11 important to them. They have family here, they have
12 lived here for decades. The risk that they are going to
13 be --

14 JUSTICE GINSBURG: And the violent felony --
15 the violent felony in this case, he had a suspended
16 sentence, didn't he?

17 MR. FLEMING: He was sentenced to -- to time
18 served essentially for this conviction, that's right.

19 JUSTICE ALITO: Now, if he had been
20 convicted of a lesser offense that was not a crime
21 involving moral turpitude, he would not be eligible for
22 the waiver, isn't that right?

23 MR. FLEMING: That -- if -- if the offense
24 would not have been waivable in the exclusion
25 proceedings, he would not be eligible, that's correct,

1 Justice Alito. But there might be other forms of relief
2 that he --

3 JUSTICE ALITO: Isn't that -- isn't that
4 strange? Suppose you have somebody who is charged with
5 a lesser offense that -- that doesn't involve moral
6 turpitude and a greater offense that does, and the
7 defense attorney comes to the client and says: I have
8 got great news; the prosecutor will take a plea to the
9 lesser offense and drop the greater one. I guess that
10 would be -- that would be bad, potentially bad advice,
11 because he ought to plead to the more serious offense
12 because then he would be eligible for a waiver.

13 MR. FLEMING: He would be eligible for a
14 waiver under section 212(c), Justice Alito, but that is
15 not the only form of relief that someone who pleads
16 guilty to a -- a crime could potentially seek. And
17 people who plead to non-inadmissible offenses, offenses
18 that do not lead to their exclusion, had other avenues
19 at the time that they could have pursued. For instance,
20 they could have pursued adjustment of status. That is
21 the -- the BIA's decision in Matter of Gabryelsky. In
22 order to adjust status, all that matters is that you not
23 be inadmissible to the country. And even if you are
24 inadmissible, you can seek a 212(c) waiver during that
25 process. Whether you are deportable or not doesn't

1 matter.

2 So there are many other ways. Looking at
3 section 212(c) on its own, it might appear anomalous.
4 But looking at the immigration law as it was before
5 1996, there are other options.

6 JUSTICE SCALIA: But what you say even
7 further reduces the significance of the 212(c)
8 possibility of waiver to the person pleading guilty.
9 You are saying -- you are saying, yes, even though --
10 even though you couldn't get it under 212(c), there are
11 a lot of other ways you might have gotten it.

12 MR. FLEMING: I'm sorry, Justice Scalia.
13 Maybe I wasn't clear. The people who could get the
14 other relief are people who pled guilty to crimes that
15 do not involve moral turpitude, which was Justice
16 Alito's hypothetical. But people who plead to crimes
17 involving moral turpitude potentially don't have that --
18 that avenue open to them.

19 JUSTICE SCALIA: But --

20 MR. FLEMING: For them, section 212(c) is
21 very important and they could rely on its availability,
22 and did.

23 JUSTICE SCALIA: But there is a large
24 category of people who -- who plead guilty to crimes
25 that do not involve moral turpitude and yet are not

1 otherwise excludable under 212(c); right?

2 MR. FLEMING: I don't know which category
3 Your Honor is thinking of. But certainly you can plead
4 guilty to a crime that does not involve moral turpitude;
5 then you would not be eligible for 212(c) relief; but
6 there might be some other way that you can -- that you
7 can get at it.

8 But that is not this category of people.
9 The category of people at issue here are people who pled
10 before 1996 to aggravated felony crimes of violence,
11 almost all of which, if not all of which, are going to
12 be crimes involving moral turpitude that are excludable
13 and therefore eligible for a waiver. It does not
14 necessarily mean they will get it; but it at least means
15 they have the right to ask the Attorney General to
16 exercise his discretion.

17 And I submit that, as this Court indicated
18 in *St. Cyr*, the private interest in avoiding mandatory
19 deportation is very strong. We have what I believe is a
20 sudden and abrupt change in the law in *Blake*; and it
21 could not have been foreseen, in fact it wasn't foreseen
22 by advocates on both sides of the "v" in these cases.

23 The remaining question for purposes of the
24 retroactivity analysis is only the strength of the
25 agency's interest in applying the rule retroactively. I

1 submit that that interest here is no stronger than it is
2 in the ordinary mine run of cases, and in fact it is
3 weaker, because all that we are talking about is the
4 opportunity to submit an application for adjudication on
5 the merits, which is subject to the discretion of the
6 agency. Mr. Judulang would have the burden of
7 convincing an immigration judge and the Board of
8 Immigration Appeals that he deserves relief in the
9 exercise of discretion. And so under Chinnery --

10 JUSTICE GINSBURG: Any change is a sharp
11 change. I think this is a very confusing set of
12 decisions. And the Wadud case that was brought up
13 before has a footnote that says that the board had
14 stated a waiver of inadmissibility may be granted in
15 deportation if the alien was excludable as a result of
16 the same facts. And then that footnote ends "we shall
17 withdraw from that language in each of these cases."

18 MR. FLEMING: That's correct, Justice
19 Ginsburg, and the operative language there is "as a
20 result of the same facts."

21 What Wadud was arguing was that recognizing
22 that his conviction would not make him excludable,
23 because it was not a crime involving moral turpitude, he
24 said nonetheless he should look to the facts of my
25 conduct, because what I did was so turpitudinous that

1 the government would surely have charged me as
2 excludable. And the board said: We are not going to do
3 that, and to the extent our prior decision suggested
4 that we are withdrawing from that language.

5 It did not say, however, that the board
6 would not look to convictions to determine
7 excludability, and in fact in Meza which was after Wadud
8 it did just that. And when the Court came to crime of
9 violence cases subsequently to that, the precedent that
10 it relied on was Meza, which focuses on the conviction.
11 I agree it does not focus on the facts, but I don't
12 think the language that Your Honor read undermines our
13 position at all.

14 JUSTICE ALITO: That is so bizarre, it makes
15 me -- he is pleading to prove that what he did was
16 really turpitudinous. It makes me think that maybe the
17 en banc Ninth Circuit was right, that this whole line of
18 cases has gone off along the wrong track quite a while
19 ago.

20 MR. FLEMING: So -- I mean the notion that
21 this form of relief is available in deportation
22 proceedings is long settled.

23 JUSTICE ALITO: Yes, yes.

24 MR. FLEMING: It's the premise of this
25 Court's decision in St. Cyr. The agency has never

1 undermined it or suggested that it was going to retreat
2 from it. No party before this Court is suggesting that
3 St. Cyr should have been overruled on that basis, so I
4 -- and I think it's very clear that Congress, after the
5 relief had been extended to deportation proceedings,
6 enacted provisions in 1990 and 1996 that would have no
7 operative effect if relief was not available in
8 deportation proceedings.

9 JUSTICE KENNEDY: Well, a lot -- a lot of
10 the statutory changes in the policy of the INS date back
11 to, was it the Second Circuit's case in Francis, which
12 talked about the equal protection component of the two
13 classes comprised of those in exclusion proceedings and
14 those in what were then called deportation proceedings.

15 Do we just accept that? It -- it seems to
16 me that that whole equal protection rationale is quite
17 doubtful.

18 MR. FLEMING: Well, there -- there are two
19 responses to that, Justice Kennedy. The first is the
20 agency has accepted that in Matter of Silva as a correct
21 interpretation of the statute, and that has been on the
22 books for 35 years now, approximately, and Congress has
23 never suggested any disapproval of it. Rather, on the
24 contrary it has assumed that that is the law, and that's
25 after the Solicitor General refused to seek certiorari

1 of that decision. The comparison also was not between
2 people in exclusion and people in deportation. It was
3 between two --

4 JUSTICE KENNEDY: So if we thought that they
5 had gone down the wrong path originally, there is
6 nothing we can do about it, and we just say we're in
7 this wilderness and we can't get out?

8 MR. FLEMING: I think, Justice Kennedy,
9 Congress at this point has not only acquiesced, but
10 indicated its understanding of the -- of the way the
11 agency has applied the law. And honestly I think this
12 is a -- a question for the government, because the
13 agency has never suggested that there was any basis for
14 retreating from that position at this late date.

15 Unless the Court has further questions on
16 retroactivity, I would move quickly to our substantive
17 position, which is that even without regard to
18 retroactivity, the Blake rule is arbitrary and
19 capricious, and there are two basic reasons for that:
20 First, that it rests on improper factors; and second,
21 that it leads to results that the BIA itself has
22 disavowed.

23 First of all, Congress has never suggested
24 that the words that it chooses in deportation provisions
25 are somehow a key to eligibility for section 212(c)

1 relief, and yet that is largely everything that the
2 board relied on in Blake, was a comparison of the choice
3 of words in deportation provisions to the choice of
4 words in exclusion provisions. But the -- the
5 provisions of the deportation statute are not some
6 enigmatic code from which the BIA can discern section
7 212(c) eligibility. They determine who is deportable,
8 but they have nothing to say about who is eligible for
9 section 212 c. Section 212 c eligibility turns on
10 whether you are inadmissible. That is what 212 c by its
11 terms refers to. And that's driven home, I believe, by
12 the addition of the crime of violence language in 1990
13 as a basis for deportation. Aggravated felonies were
14 added in 1990 at a time when it -- I believe it's clear
15 that most of them, if not all of them, were already
16 bases for exclusion. So there was no need for Congress
17 to say crimes of violence are excludable, they already
18 were because they were crimes involving moral turpitude.
19 It would have been redundant to put the same words in
20 the exclusion statute. Congress didn't do it. Congress
21 simply wanted to make clear that these people were now
22 going to be deportable based on the length of their
23 sentence.

24 JUSTICE GINSBURG: What about the
25 comparability of the crime involved as it says here that

1 was a drug offense. Does the inadmissibility criterion,
2 does that accord with the one for deportation?

3 MR. FLEMING: Yes, it does, Justice
4 Ginsburg. And because Mr. St. Cyr would have been both
5 deportable and excludable for his offense. That is the
6 logic.

7 JUSTICE GINSBURG: That ending with the
8 comparison works, right.

9 MR. FLEMING: Well, the board in Blake
10 concluded that that was -- that the linguistic
11 comparison worked there so that it did not have to find
12 itself at odds with this Court's decision in St. Cyr,
13 that's true. But when the Court -- when the
14 board originally made that decision in matter of Meza,
15 they didn't just look to the linguistic comparison. I
16 agree that if there is a perfect linguistic match, then
17 you might not need to go to look at the conviction,
18 because someone who falls under one may not necessarily
19 fall under the other. But just because Congress uses
20 different words in the deportation subsection that is
21 asserted against a particular alien doesn't mean that
22 the analysis stops, there, because the conviction might
23 well make the person excludable such that the
24 application that they are able to file in deportation
25 proceedings should give them the same relief that they

1 would have in an exclusion proceedings. So what
2 happened in 1990 when "crime of violence" was added,
3 according to the government, is that that was a radical
4 change in section 212 c eligibility stealthily and
5 silently, because of course while Congress was amending
6 212 c at that time, saying it was no longer available to
7 deportable aliens who didn't show up for certain
8 hearings and no longer available for aggravated felons
9 who were deportable who had served more than five years
10 in prison, it had said nothing suggesting that people
11 who had committed aggravated felony crimes of violence
12 were all of a sudden ineligible for section 212 c
13 relief, even though it could have said that. The notion
14 that one can infer or decode those provisions as
15 shutting out section 212 c relief for this group of
16 people silently, even though the overlap is perfect if
17 not near perfect is we would submit simply unreasonable.
18 The arbitrariness comes through in another way which is
19 that --

20 JUSTICE KAGAN: Mr. Fleming, the government
21 says that it has an interest in treating people in
22 deportation proceedings less favorable, if you will,
23 than people in exclusion proceedings. Do you dispute
24 that broad premise that the government could develop a
25 system which treated those two groups differently?

1 MR. FLEMING: That is not the way that the
2 agency has ever treated permanent resident aliens. In
3 fact, if that is the government's position that is
4 clearly a change in the law. The BIA said going back to
5 Silva, but in matter of AA a 1992 published decision
6 that it is the long -- quote "long established view of
7 the Attorney General in the federal courts that an
8 application for Section 212(c) relief filed in the
9 context of deportation proceedings is equivalent to one
10 made at the time an alien physically seeks admission
11 into the United States. " That is footnote 22 of matter
12 of AA. So the agency's longstanding position, at least
13 since Silva, has been that there is no difference
14 between an application filed in deportation and one
15 filed in exclusion. And that I think is consistent with
16 what Attorney General Thornburg said in the matter of
17 Hernandez-Casillas.

18 I'd submit one last point, which is the
19 arbitrariness of what the BIA is doing shines through in
20 that it has led to consequences that the BIA has itself
21 repudiated as inconsistent with the statute. And the
22 most salient example is the one that the government
23 admits on page 26 of its brief, which is that there is a
24 possibility that someone could get a waiver of
25 inadmissibility one day for a given conviction and then

1 be deported the next day for the very same conviction.

2 Now the BIA in 1956 in matter of G.A. said
3 that was clearly repugnant. That the agency cannot have
4 it both ways. The statute cannot mean X and not X. If
5 it does, that is the Hallmark of arbitrariness. The
6 government's only answer, as far as I know, is that it
7 will exercise its prosecutorial discretion to avoid that
8 situation. I would submit that an agency cannot defend
9 an arbitrary policy by saying that it is going to be
10 enforced in a capricious way and that it will all
11 balance out in the end. This Court should evaluate the
12 Blake rule on its own merits and if it is arbitrary, as
13 it clearly is, it should be disapproved. The other
14 indication of arbitrariness is that the Blake rule
15 revives the distinction between deportable aliens,
16 Justice Kennedy, who traveled abroad and returned and
17 other deportable aliens who did not travel aboard and
18 returned.

19 JUSTICE KAGAN: The government says that is
20 not the case. The government says that it does not
21 treat those two groups differently. Do you have
22 evidence to the contrary?

23 MR. FLEMING: Yes, Justice Kagan. The
24 evidence is the Attorney General's opinion in
25 Hernandez-Casillas. The government's only citation for

1 that is a footnote in Wadud arguing that supposedly the
2 nunc pro tunc doctrine is not still good law. But five
3 years after Wadud, in Hernandez-Casillas, Attorney
4 General Thornburg was asked by the INS to disapprove
5 Matter of L -- Justice Jackson's decision as Attorney
6 General, and Matter of G-A- and the nunc pro tunc
7 doctrine that is set out in those decisions, and he
8 expressly declined to do so. On the contrary, he
9 reaffirmed that in cases where the alien has left and
10 come back, the Attorney General and the board have
11 permitted the alien to raise any claim for discretionary
12 relief that the alien could otherwise have raised had he
13 been excluded. So nunc pro tunc clearly is still good
14 law, and the government seemed to agree with that as
15 recently as its brief in opposition to certiorari. As
16 for the travel distinction itself the government to its
17 credit does not try to defend it, and for good reason.
18 The agency in Silva has long held that there is no
19 distinction or no rational way to distinguish under the
20 statute between people who are in deportation
21 proceedings who have left and come back and people in
22 deportations who have not. Unless the Court has further
23 questions I reserve of the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you counsel.

25 Mr. Gannon.

1 ORAL ARGUMENT OF CURTIS E. GANNON

2 ON BEHALF OF THE RESPONDENT

3 MR. GANNON: Mr. Chief Justice and may it
4 please the Court:

5 The Petitioner does not dispute that some
6 comparability analysis must be applied to prevent relief
7 under former section 212 c from being extended to
8 certain grounds of de portability. But his methodology
9 of asking whether his offense could have made him
10 excludable is inconsistent with established cases from
11 the board that long predated the ones at issue here
12 involving firearms offenses and visa fraud.
13 Justice Scalia brought up the case in Wadud. That was a
14 visa fraud case. It was a prosecution under 18 U.S.C.
15 1546. That's a provision that penalizes fraudulent and
16 other misuse of visas and other immigration documents.
17 It's a very broad criminal provision. It's long been a
18 ground of de portability. And at the time the alien
19 argued that this is fraud. It's a crime involving moral
20 turpitude and therefore I would be subject to exclusion.
21 In Wadud the board rejected that analysis.

22 JUSTICE BREYER: That's true. But it may
23 save a little time. I worry we're in an arcane area of
24 the law. It was created by Robert Jackson, Attorney
25 General and by Thorn burg, Attorney General. And if we

1 are starting with that, what that says is we have a list
2 over here of excludable things and we have a list of
3 deportable things. And if you are deported for a reason
4 that shows up on that first list, than the AG could
5 waive. That's basically the outline I have. And also I
6 have, which isn't quite right, that in that first list
7 there is something called -- in big letters, CIMT or
8 something, crime of moral turpitude. And all of the
9 things on the second list, the big issue is, is it a
10 crime of moral turpitude. As I looked through the
11 opinions, this is what I got out of it. This is
12 tentative. I got out, just as you say, there are two
13 things in the second list which are not crimes of moral
14 turpitude. They consist of illegal entry crimes and gun
15 crimes. And there are special reasons for the first and
16 the second is debatable, but they have been consistent
17 with that. Then there are things that are on both
18 lists, they are crimes of moral turpitude. I counted at
19 least eight cases. Say, for example, rape, burglary,
20 manslaughter, second degree robbery, indecency with a
21 child and probably some others are all crimes of moral
22 turpitude, so it cuts here, okay. Then I find Blake,
23 and Blake says sexual abuse of a minor is not a crime of
24 moral turpitude. That's a little surprising. But it
25 gives us a reason because, and this was the problem

1 here, it talks about, there has to be substantial --
2 there has to be similar language in the two lists. I
3 don't know where that one came from. It certainly had
4 not been in the earlier cases. And now we have this
5 case, which is voluntary manslaughter. I would have
6 thought that voluntary manslaughter is right at the
7 heart of the lists that they said the things are crimes
8 of moral turpitude, and not like visa crimes or gun
9 crimes, if I read the cases. So where do I end up?
10 Well, what I end up with is this. And this is what I
11 would like you to reply to. Justice Brandies once said
12 something like we have to know before we can say whether
13 an agency opinion is right or wrong, what they are
14 talking about. I felt perplexity after I had read
15 through these decisions. In other words, I don't
16 understand it. So I would like you to explain to me why
17 this all fits together and how, if you can do that, I
18 couldn't get that clear explanation from the brief, and
19 I suspect it is not your fault.

20 MR. GANNON: Well, I agree that the history
21 and the law here is relatively complicated and it has
22 had a lot of moving pieces over the years. But I think
23 that the board has been very consistent, especially
24 beginning in the 1984 Wadud decision that was picked up
25 in the Jimenez-Santillano decision and also in firearms

1 offenses. Justice Breyer, you talked about the fact
2 that the board had been consistent in firearms offenses.
3 And the Petitioner does not dispute that firearms
4 offenses are ones that do not have a comparable
5 ground --

6 JUSTICE BREYER: Rape, burglary,
7 manslaughter, second-degree robbery -- all of those
8 cases -- about seven or eight of them.

9 MR. GANNON: If I could go back for a second
10 to firearms offenses. The board there has continued to
11 say that there is no comparable ground for firearms
12 offenses, even if your firearms offense would be
13 something that could have been considered a crime
14 involving moral turpitude.

15 If you look at the board's 1992 decision in
16 Montenegro, that was a case that was assault with a
17 firearm, and so it wasn't merely possession of a handgun
18 or an automatic weapon or a sawed-off shotgun --

19 JUSTICE GINSBURG: Is there any aggravated
20 felony crime of violence that is not a crime involving
21 moral turpitude?

22 MR. GANNON: Yes, Justice Ginsburg. The
23 board pointed out in the Brieva-Perez decision that
24 minor but relatively common crimes of violence,
25 including simple assaults and burglary, generally are

1 not considered to be crimes involving moral turpitude.

2 In the reply brief, Petitioner points to a board

3 petition in Louissaint saying that -- that the record is

4 muddled on burglary, but that opinion only showed that

5 residential burglary isn't a crime involving moral

6 turpitude, and a crime of violence, in the definition,

7 is one that involves the use of physical force against

8 personal property of another.

9 And so it doesn't need to be aggravated in

10 any other sense. It doesn't need to be --

11 JUSTICE GINSBURG: Was Judulang's crime a

12 crime involving violence?

13 MR. GANNON: Yes, it was a crime --

14 JUSTICE GINSBURG: I mean a crime of moral

15 turpitude.

16 MR. GANNON: Yes, it was. But what I'm

17 trying to say, Justice Ginsburg, is that Petitioner's

18 approach of looking to the conviction is inconsistent

19 with the board's repeated --

20 JUSTICE BREYER: Don't -- that may be his

21 approach. My approach is look to the category.

22 MR. GANNON: And, Justice Breyer --

23 JUSTICE BREYER: Look to the category. And

24 the category here is not, you know, category as in

25 crime, the category is what kind of a crime. And this

1 is a crime of violence. In the statute, or if you look
2 at what was charged, it's called voluntary manslaughter.
3 Either way, I would think those categories as categories
4 fall within "crime of moral turpitude."

5 MR. GANNON: Well, but -- but the category
6 that is relevant is the crime of violence. And as I
7 just discussed with Justice Ginsburg, there are indeed
8 crimes of violence that satisfy the statutory definition
9 in 18 U.S.C. 16 --

10 JUSTICE SOTOMAYOR: But you're not -- you're
11 not --

12 JUSTICE SCALIA: Can I hear this answer? I
13 was very interested in the question. It seemed to make
14 a good point.

15 JUSTICE BREYER: Thank you.

16 MR. GANNON: If I could finish up on the
17 firearms analogy, I think that this is responsive,
18 Justice Breyer, to your point about looking at the
19 category. And in Montenegro, the board specifically
20 concluded that this offense, assault with a firearm,
21 it's a firearms offense, but because we've already
22 concluded that as a categorical matter, firearms
23 offenses aren't on the list of exclusion crimes; we
24 don't care and we're not going to ask ourselves whether
25 it could have been a crime involving moral turpitude.

1 The board applied that same reasoning again
2 in the 1995 opinion in Espinoza. We quote all of these
3 opinions on page 41 of our brief.

4 And so, in these two categories, firearms
5 offenses and visa fraud offenses, both of which could
6 often involve moral turpitude on an -- in any individual
7 case -- that such offenses could involve moral
8 turpitude, just like a crime of violence may well
9 involve moral turpitude, and yet the board concluded
10 that because as a categorical matter, this is not
11 comparable to any grounds of exclusion, it was going to
12 say that it was not going to extend this relief, that --

13 JUSTICE GINSBURG: What -- what --

14 CHIEF JUSTICE ROBERTS: Let's let Justice
15 Sotomayor jump in now with her question.

16 JUSTICE SOTOMAYOR: I go back to Justice
17 Breyer's question. What you just said made logical
18 sense; the category of gun possession doesn't go in.
19 Visa fraud doesn't become a crime of moral turpitude.
20 But we have cases that have said generically,
21 manslaughter which involves violence is a crime of moral
22 turpitude. Others have qualified sexual abuse of a
23 minor. I don't know of anyone who would think that that
24 category of crimes, whether you call it indecency,
25 touching or -- we've already said touching alone may not

1 qualify -- but my point is, you now are saying, I think,
2 and correct me if I'm wrong, that aggravated violent
3 felons is an entire category, and anything that falls
4 under that label can't be a grounds of exclusion.

5 MR. GANNON: No.

6 JUSTICE SOTOMAYOR: That's how I read your
7 categorical comparison, though.

8 MR. GANNON: The board has made it clear
9 from as early as the Meza decision that it would look
10 into the specific category within the definition of
11 aggravated felony -- in order to be a category --

12 JUSTICE SOTOMAYOR: So now why is
13 manslaughter not a crime of moral turpitude?

14 MR. GANNON: Because that is not the
15 category in the aggravated felony definition that we are
16 talking about. What we are talking about is crimes of
17 violence. That's the category. And so --

18 JUSTICE KAGAN: But, Mr. Gannon, suppose
19 this. Suppose that on the exclusion side, you have this
20 category of crimes of moral turpitude, and suppose in
21 the deportation side -- which I think is right, you have
22 a category called crimes of violence, and you also have
23 a category called crimes of moral turpitude. There is a
24 time limit on that --

25 MR. GANNON: We do have that category here.

1 JUSTICE KAGAN: That's right. Suppose that
2 you -- the government could have slotted manslaughter
3 into either of those categories on the deportation side,
4 and I understand that there is a dispute about whether
5 it could have, but let's suppose it could have. So if
6 manslaughter is categorized on the deportation side as a
7 crime of violence, you say it doesn't match with the
8 category on the exclusion side. But if the same crime
9 is categorized in a different way by the government,
10 then it does match on the exclusion side. So what sense
11 does that make, the government's decision about how to
12 categorize a -- a given offense on the deportation side
13 is going to determine whether a person gets relief?

14 MR. GANNON: Well, I think that there's no
15 dispute about that between us and Petitioner. If
16 somebody had a firearms offense, it could have been
17 charged either way.

18 JUSTICE KAGAN: But the Petitioner -- the
19 Petitioner just says we look to manslaughter, and we ask
20 whether that qualifies a person for relief on the
21 exclusion side --

22 MR. GANNON: And what I'm trying --

23 JUSTICE KAGAN: But you are saying no,
24 first, we have to put manslaughter in a category on the
25 deportation side, and then we have to match that to the

1 category on the exclusion side. And what I'm asking you
2 is kind of what sense does that make? Doesn't
3 everything depend on which category you put manslaughter
4 into?

5 MR. GANNON: Well, what it -- the reason it
6 makes sense is because the statute only provides for
7 relief from grounds of inadmissibility or exclusion.

8 By its terms --

9 JUSTICE KAGAN: You are so far from the
10 statute, Mr. Gannon, you can't even tell what's closer
11 to the statute. I mean, you are miles away from the
12 statute.

13 MR. GANNON: Well, the way -- the way this
14 doctrine developed, Justice Kagan, is that it developed
15 in the context where the board recognized that the
16 statute only applied to waiver of grounds of
17 excludability, and it extended that to deportation cases
18 when it was on the basis of the same grounds that could
19 have been presented in the exclusion proceeding.

20 And so that's all we are trying to do here,
21 is to continue with that --

22 JUSTICE GINSBURG: But what your position
23 means that it's up to the agency -- up to the person who
24 makes the charge. Because take Mr. Judulang, he could
25 have been categorized as deportable because he committed

1 a crime in -- involving moral turpitude, or he could
2 have been categorized as somebody who committed an
3 aggravated felony. It is then totally in the hands of
4 the person who is making the charge whether there will
5 be a match or not.

6 MR. GANNON: The reason why that's so is
7 because the thing that is going to be waived at the end
8 of the proceeding is the ground of deportation. And so
9 if the ground of deportation is for an aggravated crime
10 of felony violence, then it needs to be one for which
11 there's 212(c) eligibility. The same would be true if
12 it were a firearms offense -- if it were --

13 JUSTICE GINSBURG: If -- if the officer
14 labels the manslaughter in this case a crime involving
15 moral turpitude, then there is a match --

16 MR. GANNON: That's --

17 JUSTICE GINSBURG: And if he labels it
18 aggravated felony, crime of violence, then there is no
19 match. So it's up to the charger whether there will be
20 this match or not.

21 MR. GANNON: That's true. It's also true in
22 the firearms offense cases and the visa fraud offense
23 cases, because those are all instances in which,
24 depending on the circumstance of the offense and
25 depending upon what it was charged, the board has

1 concluded that the 1546 offense is divisible. Some of
2 those crimes are involving moral turpitude, some of them
3 are not. And I -- and so --

4 JUSTICE KAGAN: But this isn't a question
5 about the history, Mr. Gannon. Even if we assume that
6 you are right about the history, this is a question
7 about whether this is an arbitrary system, and where you
8 are devising it from and what lies behind with it.

9 MR. GANNON: And I think that this is not
10 only consistent with the history, it is consistent with
11 the text of the regulation the Petitioner is invoking
12 here, which makes it clear that what is being waived is
13 a ground of exclusion or deportability or removability.

14 And so what is relevant is whether the
15 ground of removability is the aggravated felony crime of
16 violence ground or the crime involving moral turpitude
17 ground. Depending on which ground it is, that's what he
18 is seeking relief for --

19 JUSTICE GINSBURG: Then -- then you have to
20 say yes, you can have somebody who would get a waiver of
21 inadmissibility for a crime, and the very next day be
22 put in deportation without any waiver for that same
23 crime.

24 MR. GANNON: We have no cases in which that
25 has happened. And the cases in which the board said

1 that that result would be clearly repugnant were ones in
2 which there was a comparable ground. The board was
3 saying that if you get 212(c) relief on the grounds of
4 exclusion --

5 JUSTICE GINSBURG: But these categories --

6 MR. GANNON: Pardon?

7 JUSTICE GINSBURG: These categories.

8 MR. GANNON: No, there -- there are no cases
9 that address that principle in the context where there
10 is no comparable grounds. And if -- if I could just
11 make one point about this claim of Petitioner's in his
12 reply brief that he could have been subject to a charge
13 of deportability on the basis of a crime involving moral
14 turpitude, I would caution the Court against relying on
15 that for two reasons, one factual and one legal.

16 One is that there is no factual basis in the
17 administrative record to -- to talk about this 1987 trip
18 to the Philippines. Yes, we do have evidence from
19 outside the record that makes us believe that it
20 occurred, but the statute that provides for judicial
21 review here of the order of removability in 8 U.S.C.
22 1252(b)(4)(A) specifically says that the determination
23 needs to be made on a basis of the administrative
24 record. And the only evidence in the record about that
25 trip is actually a statement from Petitioner's mother

1 that says that it occurred in 1989, the year after the
2 crime.

3 But even assuming that -- that the trip
4 happened, in light -- as I said, we do believe on the
5 basis of evidence outside the record that it did occur
6 -- there is a legal reason why I would caution the Court
7 against assuming that that means the Petitioner could
8 have been deportable for a crime involving moral
9 turpitude, and that is the so-called Fleuti Doctrine.
10 Under this Court's 1963 decision in *Rosenberg v. Fleuti*,
11 which is actually relevant to a case on which you
12 granted certiorari a couple of weeks ago, this Court
13 concluded that if an LPR takes a brief, casual, and
14 innocent trip outside the country and returns to the
15 United States, that will not trigger an entry upon his
16 return to the United States.

17 And so I think it's very likely that under
18 Ninth Circuit precedent in 1989, when Petitioner was
19 pleading guilty to his voluntary manslaughter charge, he
20 wouldn't have had any reason to think that he was doing
21 so within 5 years of when he committed -- when he
22 entered the country for purposes of the statute.

23 I think it's also --

24 JUSTICE BREYER: Can we go back to the
25 second one? It's very interesting. Suppose I say:

1 Okay, I concede. I'd only do it for the sake of this
2 question: You are absolutely right in your
3 categorization. The right category is crime of
4 violence. And then I look at the statute, which is 8
5 U.S.C. 1101(43), which you probably know by heart -- and
6 I look at the definition of gun crimes, and I look at
7 crimes of violence.

8 My non-schooled reaction is, well, gun
9 crimes, I can see why they said that wasn't really a
10 crime of moral turpitude, because there are a lot of
11 registration requirements, there are all kinds of
12 different things that drug dealers -- gun dealers have
13 to do, and you could commit that crime in various ways
14 that don't involve moral turpitude. I can understand
15 that, sort of.

16 At least, I can see how somebody else might
17 have understood it that way. Now, I think crimes of
18 violence, I say, hey, I am having trouble here. Why
19 don't you try to list a few crimes of violence that when
20 they come into the country you are going to say, oh,
21 that wasn't a crime of moral turpitude? And by the way,
22 I am not asking you to list specific examples; I am
23 asking you to list categories. List categories of
24 crimes of violence that when the person comes in, you
25 are going to say, hmm, no moral turpitude there.

1 MR. GANNON: The chief examples are the ones
2 that the board gives in the Brieva-Perez opinion, which
3 are simple assaults, which has --

4 JUSTICE BREYER: That is not a crime of --
5 that is not a moral turpitude, simple assault? You're
6 going to just hit somebody?

7 MR. GANNON: That is correct, it is not a
8 crime involving moral turpitude.

9 Neither is non-residential burglary which
10 involves force against -- against property, which would
11 therefore satisfy the definition. This is an opinion
12 that --

13 JUSTICE BREYER: Burglary -- isn't burglary
14 where it might be an occupied building?

15 MR. GANNON: If it were an occupied
16 building, if it were a dwelling --

17 JUSTICE BREYER: Well, no. A warehouse. I
18 am being -- quibbling now. Of course, my basic
19 concern --

20 MR. GANNON: In the Ninth Circuit, burglary
21 of a residential dwelling that's occupied is not a crime
22 involving moral turpitude.

23 JUSTICE BREYER: Oh, really? Okay.

24 MR. GANNON: In -- in a case that is cited
25 in the concurring opinion --

1 JUSTICE BREYER: So there are some. There
2 are some.

3 MR. GANNON: There certainly are.

4 JUSTICE BREYER: They're a little odd, but
5 what I'm raising --

6 MR. GANNON: They tend to be minor -- minor
7 -- more minor offenses.

8 JUSTICE BREYER: Okay. What I'm afraid of
9 is this: That once you put this in your category, that
10 you say crimes of violence are not crimes of moral
11 turpitude, then to a large extent you have said
12 good-bye, Justice or Attorney General Robert Jackson.

13 MR. GANNON: I don't --

14 JUSTICE BREYER: You are saying good-bye to
15 Jackson and Thornburgh, because you have driven such a
16 wedge between these two statutes that there's hardly
17 anybody who would be able to qualify for the Jackson-
18 Thornburgh approach to this statute.

19 MR. GANNON: I just --

20 JUSTICE BREYER: I overstate slightly, but
21 you see my point.

22 MR. GANNON: I see your point,
23 Justice Breyer, and if you look at all of the cases that
24 predate the era that we are talking about here, they all
25 -- almost all involve two categories of defenses, drug

1 trafficking or controlled substance offenses and crimes
2 involving moral turpitude, things that were actually
3 charged under the ground of deportation for crimes
4 involving moral turpitude.

5 And here, Congress added aggravated felonies
6 to the deportation side of the ledger, but didn't add it
7 to the exclusion side of the ledger. And then it
8 repeatedly expanded the definition of "aggravated
9 felony" between 1988 and 1996 in ways that made these
10 offenses treatable in different ways for purposes of
11 deportation than they were for exclusion.

12 And as a category --

13 JUSTICE SOTOMAYOR: Well, I keep going back
14 to my question. There's only one category now,
15 aggravated violent felony. That's the only category you
16 are looking at. It doesn't matter, in your judgment.
17 That -- that is your test.

18 MR. GANNON: That's -- I disagree, Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: If it qualifies as an
21 aggravated violent felony, it cannot be a crime of moral
22 turpitude.

23 MR. GANNON: I disagree with that -- the
24 fact that that's the category we are looking at.

25 We're looking inside the definition of

1 aggravated felony, to the particular ground which is
2 crimes of violence. And then what we are saying is that
3 the analysis needs to be done at a categorical level.
4 And the board has said that you cannot get a 212(c)
5 waiver from a ground of deportability unless that ground
6 of deportability is substantially equivalent to a
7 waivable ground of exclusion.

8 JUSTICE SOTOMAYOR: Let's go back to a
9 concrete example following Justice Ginsburg's example.
10 Someone is charged with a crime of violence, voluntary
11 manslaughter. And would an officer at the airport say
12 you're not admissible; that's a crime involving moral
13 turpitude? Could the officer say that?

14 MR. GANNON: Yes, the officer could say
15 that.

16 JUSTICE SOTOMAYOR: And could he then waive
17 that ground under 212(c)?

18 MR. GANNON: Generally, yes. I mean -- we
19 are talking about pre-1996 offenses.

20 JUSTICE SOTOMAYOR: Now let's assume that he
21 did, that he waives that crime of moral turpitude.
22 Would the government now put that individual in
23 deportation and say this voluntary manslaughter doesn't
24 meet the statutory counterpart test. So for that very
25 crime, we are going to deport you, even though we let

1 you in, because it's a crime involving violence.

2 MR. GANNON: We don't have any examples like
3 that, and --

4 JUSTICE SOTOMAYOR: Would you? Can you?

5 MR. GANNON: And -- I --

6 JUSTICE SOTOMAYOR: Is that where your test
7 leads you?

8 MR. GANNON: Well, ultimately, even the
9 durability of the 212(c) waiver wouldn't necessarily
10 have protected somebody against a subsequent proceeding.

11 JUSTICE GINSBURG: But yet in your brief, I
12 thought you conceded that.

13 MR. GANNON: We --

14 JUSTICE GINSBURG: That -- just the example
15 that Justice Sotomayor gave. Somebody is declared
16 inadmissible because it's a crime with manslaughter or
17 aggravated felony crime of violence is on the
18 admissibility side a crime involving moral turpitude, so
19 he's allowed in. And then he's in and he's declared
20 deportable and he can't get a waiver because there's no
21 analogue. I thought your brief said yes, that's the
22 consequence of our argument; however, prosecutors would
23 not seek deportation if inadmissibility had been waived.

24 MR. GANNON: Well, we -- the brief did say
25 that this is hypothetically possible. I am aware of no

1 instances in which it has happened, and we don't have a
2 board decision about what the effect of the earlier
3 waiver would be on a non-comparable ground in a
4 subsequent deportation proceeding. And I do think,
5 however, that, regardless of the prosecutorial
6 discretion point here, even if the board were to
7 conclude that the 212(c) waiver carried across and would
8 prevent this alien from being deportable in a subsequent
9 proceeding, an important purpose would still be served
10 by encouraging the alien to get himself into exclusion
11 proceedings at the beginning, because that is what
12 several courts have concluded would be a rational basis
13 for differential treatment in encouraging aliens to seek
14 212(c) waivers in the exclusion context.

15 Congress, when it adopted the aggravated
16 felony definition and repeatedly expanded it, it was
17 concerned about criminal aliens in this country, and
18 ways to get them out of this country. And so, to the
19 extent that 212(c) relief still is available for certain
20 LPRs who meet certain threshold criteria and they are
21 being deported on the basis of crimes that would have
22 made them inadmissible -- if an alien then wants to seek
23 212(c) relief, he can get himself into an exclusion
24 proceeding, or he could seek advanced parole on the
25 I-191 form that Petitioner --

1 JUSTICE BREYER: You are also telling me
2 that -- I didn't know this; I learn something in every
3 argument -- that if we have Jack the cat burglar who was
4 burgling dozens of office buildings -- and abroad -- and
5 assaults people and hits them over the head or whatever
6 with his -- I guess with his fist, that we have no way
7 of excluding that person, should he try -- I -- I have
8 heard criticisms of our immigration policy, but this is
9 surprising to me, that we have no way of excluding that
10 person who is filled with the simple burglary of office
11 buildings and assaults.

12 MR. GANNON: Well, there was a separate
13 ground which is two crimes, any two criminal offenses.

14 JUSTICE BREYER: So he has only done it
15 once; we have to let him --

16 MR. GANNON: If he has only done it once,
17 then it may well be that it wouldn't qualify. But the
18 board has repeatedly declined to consider whether such a
19 crime, which would be -- could potentially be a ground
20 for exclusion would automatically guarantee that -- that
21 the alien could receive a waiver of any ground of
22 deportability based on the same conviction. And -- and
23 when my friend --

24 JUSTICE BREYER: I take it they haven't
25 decided. So --

1 MR. GANNON: No, I'm saying that the board
2 repeatedly declined to apply this analysis in the
3 context of firearms offenses and visa fraud offenses
4 where the alien said my offense is a crime involving
5 moral turpitude; I could have been charged with being --
6 I could have been excluded on the basis of my visa fraud
7 offense or my assault with a firearm, because assault
8 with a fire arm is a crime involving moral turpitude.

9 JUSTICE SOTOMAYOR: Could I ask just a
10 practical question? Does this issue go away finally
11 when there are no more St. Cyr people? Meaning is there
12 -- there is no 212(c) anymore.

13 MR. GANNON: Well, there -- there is a new
14 provision, cancellation of removal, which indisputably
15 just simply is unavailable to anyone with a aggravated
16 felony conviction.

17 JUSTICE SOTOMAYOR: Exactly.

18 MR. GANNON: And -- and --

19 JUSTICE SOTOMAYOR: And so really the issue
20 that we have at the moment is whether your decision to
21 effect what has happened now in the past, to do what
22 Congress has done moving forward, and to avoid St. Cyr,
23 is just to say, if it's an aggravated crime of violence
24 it just doesn't qualify anymore.

25 That's what you are doing. You're not

1 giving 212(c) to anybody anymore?

2 MR. GANNON: Well, we're -- we're giving it
3 to aliens like this, aliens who have older convictions,
4 pre-1996 guilty pleas--

5 JUSTICE SOTOMAYOR: But you were just saying
6 if they are aggravated -- if they've committed an
7 aggravated crime of violence they are not getting it
8 anymore.

9 MR. GANNON: That -- that is if it was a
10 crime that was -- a conviction that occurred after
11 212(c) was repealed. So for instance, in this case if
12 on remand the board considered one of the other charge
13 grounds of deportation.

14 JUSTICE SOTOMAYOR: But this whole thing
15 goes away once all the St. Cyr people have --

16 MR. GANNON: Yes, because 212(c) only lives
17 on by virtue of St. Cyr right now. And I -- but -- but
18 I do want to stress that this -- I think Justice Kagan
19 was correct to point out that this was clarifying a
20 previous state of the law. We believe that there are
21 very clear principles on the cases that are cited on
22 page 41 of our brief, that the board had refused to do
23 the analysis on -- on a conviction level as opposed to a
24 categorical level, and my friend keeps quoting Attorney
25 General Thornburgh's opinion in Hernandez-Casillas for

1 his readoption of the nunc pro tunc doctrine, but I
2 would like to point out that the Attorney General there
3 made it very clear in his holding that he was
4 reaffirming the statutory counterpart doctrine as it
5 existed at the time, and at page 291 of his opinion he
6 says that he rejects the board's attempts to extend
7 212(c) to, quote, "grounds of deportation that are not
8 analogous to the grounds for exclusion listed in section
9 212(c)."

10 JUSTICE GINSBURG: But he also said that
11 there are only two grounds for deportation that have no
12 analog in the grounds for exclusion.

13 MR. GANNON: That's -- you're --

14 JUSTICE GINSBURG: Entry without inspection
15 and firearms conviction.

16 MR. GANNON: That -- that is what footnote 4
17 of the opinion says. That is clearly an under-inclusive
18 list because it doesn't include visa fraud offenses
19 which had already been recognized in Wadud as being a
20 category that did not have a comparable ground, and --
21 and that was reaffirmed later in the Jimenez-Santillano
22 opinion. My friend quotes the Jimenez-Santillano
23 opinion in -- in his reply brief for the proposition
24 that Wadud was really about the facts. This was his
25 answer to you, Justice Scalia. But if you look at the

1 Jimenez summary of what actually happened in Wadud, the
2 other half of the sentence that's being quoted there
3 says the board in Wadud, quote, "observed that we did
4 not need to decide whether Respondent's 1546 offense was
5 a crime involving moral turpitude because no ground of
6 inadmissibility enumerated in section 212(a) of the act
7 was comparable to section 1546." And so --

8 JUSTICE ALITO: Do you know how potentially
9 how many people may be affected by the decision in this
10 case?

11 MR. GANNON: I don't have a good estimate of
12 that because we don't know how many offenders with
13 pre-1996 guilty pleas will end up being picked up by
14 immigration authorities and -- and charged under these
15 circumstances. Petitioner is somebody who at -- at the
16 time he committed his offense wasn't even an aggravated
17 felon. It's only by virtue of the retroactive
18 applicability of the definition that he became an
19 aggravated felon. And so that makes the sort of St. Cyr
20 question about his reliance a -- a bit perplexing here.

21 At the time when he was pleading guilty to
22 voluntary manslaughter, because it wasn't within 5 years
23 of -- of entry, it wouldn't have been a crime involving
24 moral turpitude and therefore it wouldn't have been a
25 ground for deportability, and it also was not yet an

1 aggravated felony. So he had no reason to think he was
2 pleading guilty to a deportable offense.

3 JUSTICE ALITO: But do you know how many
4 times this has come up in cases over, let's say the past
5 5 years?

6 MR. GANNON: I don't know how many times
7 that -- all of the cases that are cited in Petitioner's
8 brief and -- and the amicus brief, there is a gap
9 between 1996 and about 2003, because of the repeal of
10 212(c) and St. Cyr and the regulations. There was about
11 a 7-month period after the regulations before the board
12 decided Blake and Brieva-Perez.

13 There are on the order of several hundred
14 212(c) applications that are being granted by the board
15 each year right now, but that's with a backlog of cases
16 some of which have been pending for -- for an incredibly
17 long time.

18 JUSTICE KAGAN: You said, Mr. Gannon, the
19 government no longer treats people differently depending
20 on whether they left the country and returned or haven't
21 left at all. Mr. Fleming points out that you said the
22 opposite in your brief opposing cert. He said that --

23 MR. GANNON: I -- I appreciate your chance
24 to let me clarify, Justice Kagan. In our brief in
25 opposition, we stated that an alien could avoid the

1 statutory counterpart rule by leaving the country. That
2 meant that by getting himself into an exclusion
3 proceeding, the statutory counterpart rule then would
4 not be applicable. It didn't mean that had he left the
5 country, come back if they did an exclusion proceeding
6 and they put in a subsequent deportation proceeding,
7 that the statutory counterpart rule wouldn't apply.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Gannon.

10 Mr. Fleming, you have 6 minutes remaining.

11 REBUTTAL ARGUMENT OF MARK C. FLEMING

12 ON BEHALF OF THE PETITIONER

13 MR. FLEMING: Thank you, Mr. Chief Justice.

14 I would begin simply by following up on the
15 questions that Justices Ginsburg and Kagan asked to my
16 brother about my client could have been charged as
17 deportable with his conviction treated as a crime
18 involving moral turpitude. In fact, he was. If one
19 looks at the decisions in the appendix to the petition
20 for certiorari, specifically at page 11A, it's clear
21 that his conviction is asserted not only as an
22 aggravated felony crime of violence, but also as a crime
23 involving moral turpitude, and the immigration judge
24 found that he was in fact deportable with that
25 conviction forming a crime involving moral turpitude.

1 So there is no dispute here that Mr.
2 Judulang's conviction falls into both categories. On
3 the issue of the factual basis of my client's
4 deportability at the time of the plea, Mr. Gannon is
5 correct; there is nothing in the administrative record
6 that says that, and that is why this Court typically
7 does not countenance arguments based on the facts by the
8 respondents that are raised only in the brief on the
9 merits. If anyone had suggested that this was an issue
10 on which a factual record needed to be developed, we
11 could have done it; it would not have been hard.

12 I also want to comment on one point that Mr.
13 Gannon made, which is the thing that -- that is waived
14 under 212(c) is a ground of deportation. That's not
15 correct. Section 212(c) provides relief from
16 inadmissibility. It says that clearly in its text; that
17 is how the regulations and the decisions have always
18 treated it. The form that immigrants are instructed to
19 fill out, form I-90 -- I-191 which is appended to our
20 blue brief specifically says: State the reasons you may
21 be inadmissible to the United States.

22 If a waiver of inadmissibility is granted,
23 that waiver protects the immigrant from subsequent
24 deportation based on the same conviction. That is the
25 language of Matter of G-A, which the government itself

1 excerpts in its brief; and Justice Ginsburg is correct,
2 that is -- they admit that a waiver is durable in that
3 sense. If it is granted to waive inadmissibility, it
4 protects the alien from deportation on any deportation
5 subsection based on that same conviction.

6 I thought it was telling, Justice Breyer, in
7 reaction to your question which -- which was seeking an
8 explanation of how this scheme is reasonable, the answer
9 that counsel for the government gave was that the BIA
10 has been consistent with firearms and visa fraud cases,
11 but there was no explanation as to how the Blake rule as
12 it is now drawn is in any way a reasonable application
13 of the law. I would submit for the reasons that Your
14 Honor pointed out, which is that we have a number of --
15 whether one calls them convictions or whether one calls
16 them categories of crimes -- voluntary manslaughter,
17 aggravated burglary -- recall that we are talking about
18 aggravated felony crimes of violence.

19 I recognize that if we talk about third
20 degree burglary, which could be charged on the basis of
21 someone opening an unlocked door and walking across the
22 threshold, maybe that's not a crime involving moral
23 turpitude but it is probably is not an aggravated felony
24 crime of violence either, certainly not in this Court's
25 decision.

1 So I would submit that the government has
2 not identified a crime that would be both an aggravated
3 felony crime of violence and yet not a crime involving
4 moral turpitude. The overlap is, I would submit, total.
5 And even if it's not total, that is not the end of our
6 argument because the board itself has said you, don't
7 need a perfect match; you just need substantial overlap.
8 And the overlap is at the very least substantial, if not
9 complete.

10 The crime that was charged in Brieva-Perez
11 itself, unauthorized use of a vehicle under Texas law,
12 has subsequently held by the Fifth Circuit not to be an
13 aggravated felony at all. So Brieva-Perez on its own
14 terms is no longer good law as we point out in our reply
15 brief.

16 The interest that Mr. Gannon asserted at one
17 point about getting immigrants to put themselves into
18 exclusion proceedings, this is a very important point.
19 The agency has never suggested that that is the way that
20 it runs the railroad. On the contrary, it has expressly
21 said the opposite.

22 It does not matter whether the 212(c)
23 application is filed in exclusion proceedings, in
24 deportation proceedings, or outside of proceedings
25 entirely by sending a letter to the district director

1 saying: Please give me an advance waiver before I
2 travel abroad. The regulations make very clear and the
3 decisions make very clear, I quoted matter of AA in my
4 opening argument, that an application is identical and a
5 relief that is given is identical, regardless of the
6 proceedings.

7 For Mr. Gannon to stand up and say that the
8 agency is now creating a sharp distinction, saying that
9 applications filed in exclusion are omnipotent, and
10 applications filed in deportation proceedings are
11 meaningless is a clear change in the law, and it is
12 unfair to apply it against immigrants like Mr. Judulang
13 and others who relied on the availability of section
14 212(c) as protection from removal, whether exclusion or
15 deportation in the future, when they pled guilty.

16 Justice Sotomayor, your question about how
17 many people are involved here, it is difficult to
18 identify specific numbers because very often these cases
19 are decided at the immigration judge level that are not
20 reported. In the appendix to our petition for
21 certiorari we identified over 160 people who have been
22 subject -- who have suffered under the Blake rule since
23 Blake was decided in 2005.

24 And part of the problem is that we are
25 talking about a group of people who have been in the

1 country for a long time, whose convictions are dated,
2 who are law abiding, who are reformed, and they only
3 come to the attention of the authorities subsequently
4 through perfectly law abiding conduct such as applying
5 for naturalization or renewing a green card so that
6 they --

7 JUSTICE SOTOMAYOR: If they weren't
8 law-abiding, they would have committed a new felony that
9 would render them inadmissible --

10 MR. FLEMING: And potentially subject them
11 to removal, exactly. And there might be other forms of
12 relief, as Mr. Gannon mentioned. But -- That's
13 certainly right. But a good number of the people here
14 who have been harmed by the Blake rule are people who
15 are the most deserving candidates for relief. And the
16 NIJC brief, I think, sets that out I think quite
17 convincingly.

18 We would submit that the only reasonable
19 approach here is the one that the agency took for years
20 under Meza and under the eight decisions that Justice
21 Breyer referenced where the immigration knew the rule,
22 they applied it, they looked to the conviction, they
23 figured out whether the conviction would trigger
24 excludability; if it did, then the alien was entitled to
25 apply on the same basis and with the same effect as if

1 he had found himself in exclusion proceedings.

2 The judgment should be reversed, and Mr.
3 Judulang should be allowed to file his application for
4 adjudication on the merits.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Counsel, the case is submitted.

7 (Whereupon, at 12:08 p.m., the case in the
8 above-entitled matter was submitted.)

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